

Public Prosecutor v Ilamaran**A**

HIGH COURT (SHAH ALAM) — CRIMINAL REVISION NO 43-7-91
WAN YAHYA J
5 AUGUST 1991

B

Criminal Procedure — Arrest — Accused charged with trafficking in dangerous drug — Procedures to be complied with by prosecution following arrest under s 39B of the Dangerous Drugs Act 1952

C

Criminal Procedure — Bail — Non-bailable offence — Accused charged with trafficking in dangerous drug — Accused remanded pending certification of weight of drug by chemist — Whether court could grant bail — Dangerous Drugs Act 1952 ss 39B & 41B Criminal Procedure Code (FMS Cap 6) s 388(1)

D

Criminal Procedure — Charge — Explaining the charge — Accused charged with trafficking in dangerous drug — Weight of drug not certified by chemist — Whether charge could be properly explained to accused — Dangerous Drugs Act 1952 s 39B(4)

The accused was arrested and charged in the magistrate's court for trafficking in 261g of cannabis. The charge was read and explained to the accused but he was not asked to plead. The accused was then remanded in custody while waiting for the chemist's report and the public prosecutor's consent. The accused was produced at monthly intervals before the magistrate for mention. When the accused was produced for the third time, he applied for bail which was granted by the magistrate. The prosecution applied to the High Court to revise the magistrate's order on bail. The accused argued that since the weight of the drug had not been certified by the chemist, the charge could not be properly explained to him and s 39B(4) of the Dangerous Drugs Act 1952 ('the Act') had therefore not been complied with.

E**F**

Held, allowing the application:

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(1) There was nothing in the magistrate's notes to indicate any perplexity in explaining the charge to the accused. Neither was it suggested anywhere that the accused found the charge to be incomprehensible. The mere prospect of an amendment of the weight of cannabis mentioned in the charge could not render the charge unexplainable, questionable or in any way defective.

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(2) In any arrest made pursuant to s 39B of the Act, all the prosecution needs to do is to produce the arrested person before the court and have the charge read out and explained to him. Once these procedures had been complied with the court must make an order to remand the accused person in accordance with the mandatory provision of s 41B of the Act.

I

(3) It is not open to the defence on the mere hypothesis that the final amount of the drug as determined by the chemist could be less than the amount with which the accused was initially charged, to

- A** move the court into granting bail under s 388(1) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). This is because it is illogical and invalid for the accused to challenge the prosecution into proving part of its case even before the commencement of the trial.
- B** (4) Accordingly no court can, in purported exercise of its powers derived from s 388 of the CPC, grant bail to any person charged with any of the offences specified in paras (a), (b) or (c) of s 41B(1) of the Act.
- (5) In exercise of the court's revisionary powers, the magistrate's order on bail was set aside and the accused was ordered to be produced from time to time before a magistrate for the issuance of further remand orders pending the analysis by the chemist.
- C** (6) Counsel is entitled to cite one differing authority in preference to another by courts of co-ordinate jurisdiction but when the same question of law has been settled by a judgment of a higher court, then counsel as an officer of the court is duty bound to disclose that case to the court unless he is totally oblivious of it.
- D**

[Bahasa Malaysia summary]

- E** Si tertuduh telah ditangkap dan dituduh dalam mahkamah majistret mengedarkan dadah kanabis sebanyak 261g. Pertuduhan itu telah dibaca dan dijelaskan kepada si tertuduh tetapi beliau tidak diminta membuat akuan. Si tertuduh kemudiannya telah ditahan bawah pen-jagaan sementara menanti laporan ahli kimia dan keizinan pendakwa raya. Si tertuduh telah dikemukakan setiap bulan di hadapan majistret untuk sebutan. Apabila si tertuduh dikemukakan pada kali yang ketiga, beliau telah memohon mendapatkan jaminan yang telah dibenarkan oleh majistret itu. Pihak pendakwa memohon kepada Mahkamah Tinggi untuk mengkaji semula perintah majistret tentang jaminan. Si tertuduh berhujah bahawa kerana berat dadah itu belum diperakui oleh ahli kimia, pertuduhan itu tidak boleh dijelaskan dengan sepatutnya kepada beliau dan s 39B(4) Akta Dadah Berbahaya 1952 ('Akta itu') oleh kerana itu tidak dipatuhi.
- F**
- G**

Diputuskan, membenarkan permohonan itu:

- H** (1) Tiada apa-apapun di dalam nota majistret yang menunjukkan sebarang kekusutan dalam menjelaskan pertuduhan itu kepada si tertuduh. Tidak juga dicadangkan di mana-manapun bahawa si tertuduh tidak dapat memahami pertuduhan itu. Hanya jangkaan pindaan berat dadah kanabis yang disebutkan di dalam pertuduhan itu tidak boleh menyebabkan pertuduhan itu tidak boleh dijelaskan, meragukan atau bagaimana sekalipun cacat.
- I** (2) Dalam sebarang penangkapan yang dibuat sesuai dengan s 39B Akta itu, pihak pendakwa hanya dikehendaki mengemukakan orang yang ditangkap itu di hadapan mahkamah dan perlu mem-baca dan menjelaskan pertuduhan kepadanya. Sebaik sahaja

- prosedur ini telah dipatuhi mahkamah mesti membuat perintah menahan orang yang dituduh itu mengikut peruntukan mandatori s 41B Akta itu. **A**
- (3) Tidaklah terbuka kepada pihak pembela atas hanya hipotesis bahawa amaun terakhir dadah itu seperti yang diputuskan oleh ahli kimia itu berkemungkinan kurang daripada amaun dengan mana si tertuduh telah pada mulanya dituduh, untuk memohon mahkamah membenarkan jaminan di bawah s 388(1) Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu'). Ini adalah kerana tidaklah lojik dan tak sah bagi si tertuduh mencabar pihak pendakwa membuktikan sebahagian kesnya sebelum permulaan perbicaraan. **B**
- (4) Oleh kerana itu tiada mahkamah boleh, dengan maksud menggunakan kuasanya berpunca dari s 388 Kanun itu, membenarkan jaminan kepada sesiapaupun yang dituduh atas sebarang kesalahan yang ditentukan dalam fasal (a), (b) ataupun (c) s 41B(1) Akta itu. **C**
- (5) Dalam menggunakan kuasa penyemakan mahkamah, perintah majistret tentang jaminan diketepikan dan si tertuduh diperintahkan dikemukakan dari masa ke semasa di hadapan majistret untuk pengeluaran perintah tahanan selanjutnya sementara menanti analisa oleh ahli kimia itu. **D**
- (6) Peguam berhak merujuk satu autoriti bertentangan yang lebih diutamakan daripada yang lain oleh mahkamah berbidang kuasa setara tetapi apabila soalan undang-undang yang sama telah diselesaikan oleh penghakiman mahkamah yang lebih tinggi, tatkala itu peguam sebagai pegawai mahkamah berkewajipan untuk memberitahu kes itu kepada mahkamah kecuali jikalau dia tidak sedar sama sekali akan kes itu.] **E**

Notes

For cases on bail involving non-bailable offence, see 5 *Mallal's Digest* (4th Ed) paras 508–524.

For cases on explaining the charge, see 5 *Mallal's Digest* (4th Ed) paras 647–654. **G**

For cases on the revisionary power of the High Court and its scope, see 5 *Mallal's Digest* (4th Ed) paras 1952–1960.

For cases on ss 39B and 41B of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* paras 56–99 and 107–108 respectively. **H**

Cases referred to

- 1 *Loy Chin Hei v PP* [1982] 1 MLJ 31 (folld)
- 2 *Ho Huan Chong & Ors v PP* [1980] 2 MLJ 289 (not folld)
- 3 *PP v Chew Siew Luan* [1982] 2 MLJ 119 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 325, 388(1)
 Dangerous Drugs Act 1952 ss 39B(3), (4), 41B(1)(a)–(c) **I**

- A *Abdul Alim Abdullah* (Deputy Public Prosecutor) for the applicant.
T Gunaselan (*Wan Majid & Mano*) for the respondent.

Cur Adv Vult

- B **Wan Yahya J:** On 9 July 1991 I set aside the order made by the magistrate Kelang wherein she released the accused on bail of \$5,000 in two sureties and I directed that he be produced forthwith before this court. On the same day, upon hearing the submission by the deputy public prosecutor ('DPP') and having afforded the accused the opportunity of addressing me, I made an order for him to be remanded until such time when his counsel could be heard.

- C The accused was initially arrested on 5 April 1991. He was produced and charged in the magistrate's court on 13 April 1991 for trafficking in 261g of cannabis, an offence punishable under s 39B of the Dangerous Drugs Act 1952. The charge was read over and explained to him but he was not asked to plead. The accused was then remanded in custody and thereafter produced at monthly intervals, on 13 May 1991 and 10 June 1991, for mention before the learned magistrate. This, I am given to understand, is the normal procedure adopted in the lower court whilst awaiting for the confirmatory chemist report and consent of the public prosecutor which would in turn determine the appropriate court in which the accused should be formally tried. When the accused was produced for the third time on 9 July 1991, his counsel applied for bail and the learned magistrate granted the accused bail presumably under s 388(1) of the Criminal Procedure Code (FMS Cap 6) ('the CPC').

- E The argument presented by counsel before the magistrate's court which is substantially the same as what was said here this morning is that bail should not be withheld even in a case falling under s 39B when the alleged weight of the drug had not been certified by the chemist. It was submitted that in such circumstances the charge could not be properly explained to the accused person and therefore s 39B(4) has not been complied with. It is imperative to note that in the instant case the records show conclusively that the accused was charged with the offence of having possession of 261g of cannabis, and that the charge as framed had been read out and explained to him. There was nothing in the magistrate's notes to indicate any perplexity in explaining the charge to the accused and neither was it suggested anywhere that the accused found the charge to be incomprehensible. Indeed I cannot perceive how 261g of cannabis can be read to mean anything more precisely than what it was intended to convey. Counsel's allegation about the difficulty or impreciseness of explaining the charge, to my mind, cannot be sustained.

- H With respect, I am unable to appreciate this line of argument that the mere prospect of an amendment of the weight of cannabis mentioned in the charge, could render the charge unexplainable, questionable or in any way defective.

I When an offender like the accused in this case is found to have in his possession any dangerous drug and arrested, the drug so seized would be

initially weighed by the officer effecting the seizure after which a police report stating the initial weight is usually lodged at the relevant police station. If the amount of drug so seized and weighed warrants a charge under s41B to be made, the accused is brought before the court when the charge may be read and explained to him. He will not be asked to plead to the charge (see s 39B(4)) and neither will he be formally tried for the offence with which he had been tentatively charged until the consent by the public prosecutor as required under s 39B(3) has been obtained. In the meantime the offending drugs should, as expeditiously as the circumstances of the case permit, be delivered to the chemist for analysis and final determination of its weight and contents. Pending the chemist's report and the consent from the public prosecutor, the accused may by virtue of the proviso to sub-s (3) of s 39B, be remanded in custody.

It is ostensible from the above that in any arrest made pursuant to s 39B, all the prosecution needs to do is to produce the arrested person before the court and have the charge read out and explained to him. Once these procedures had been complied with the court must make an order to remand the accused person in accordance with the mandatory provision of s 41B.

It is not open to the defence at this juncture on the mere hypothesis that the final amount as determined by the chemist could turn up to be less than the amount with which the accused was initially charged, to move the court into granting bail under s 388(1) of the CPC. It is illogical and invalid for the accused to challenge the prosecution into proving part of its case even before the commencement of the trial. The mandatory provision of sub-s (1) of s 41B makes the offence mentioned therein unavailable at the moment the accused is being charged and certainly not at a later stage when he is proved to have committed the offence specified in (a), (b) or (c) in that subsection.

I do not propose to risk repetition of what was said earlier in *Loy Chin Hei v PP*¹ wherein it was said that the absolutely restrictive term of s 41B is to make the offence specified thereunder unavailable. This case was not canvassed before the magistrate but it would appear that she was somehow persuaded by *Ho Huan Chong & Ors v PP*,² an authority cited by counsel which was decided a year before *Loy Chin Hei*'s case,¹ to take this course of releasing the accused on bail. Counsel is no doubt entitled to cite one differing authority in preference to another by courts of co-ordinate jurisdiction but when the same question of law has been settled by a judgment of a higher court, then counsel as an officer of the court is duty bound to disclose that case to the court unless of course he is totally oblivious of the subsequent binding judgment.

At about the same time as the decision in *Loy Chin Hei*'s case,¹ the public prosecutor by way of a criminal reference in *PP v Chew Siew Luan*³ obtained the decision from the Federal Court to this effect: that s 388 of the CPC does not override the provisions of s 41B of the Dangerous Drugs Act 1952.

In the course of delivering his judgment Raja Azlan Shah CJ (Malaya) (as he then was) said:

The Dangerous Drugs Act 1952 (Revised 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, inter alia,

A dangerous drugs, and 'to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'.

In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act 1978 (Act A426) and became operative on 10 March 1978. Generalibus specialia derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (See also *PP v Chu Beow Hin* [1982] 1 MLJ 135.)

C Unless this Federal Court case is set aside by the Supreme Court, the magistrate's court is bound by the principle of stare decisis to follow the authority laid down in *PP v Chew Siew Luan*³ and no court in Malaysia can, in purported exercise of its powers derived from s 388 of the CPC, grant bail to any person charged with any of those offences specified in paras (a), (b) or under the circumstances mentioned in para (c) of sub-s(1) of s 41B of the Dangerous Drugs Act 1952.

D For the above reason I would, in exercise of the revisionary powers under s 325 of the CPC, set aside the magistrate's order on bail and order that the accused be produced from time to time before a magistrate for the issuance of further remand orders.

E I am not entirely oblivious to the disquieting prospect of an accused person being detained for an unlimited period under the proviso to s 39B(3) and sub-s(4) but in such an event the legal remedies will lie elsewhere for a wrongful detention and not under s 388 of the CPC.

F I therefore confirm the previous order made by this court on 9 July 1991 and direct that the accused remain remanded pending the awaited analysis and determination of the weight of the cannabis by the government chemist.

Application allowed.

Reported by Wong Kian Kheong

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